



# Law Enforcement

March 2003

## Digest

### HONOR ROLL

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### MARCH LED TABLE OF CONTENTS

<b>ARTICLE: CUSTODIAL ARREST AND SEARCH INCIDENT TO ARREST OF THOSE ARRESTED FOR DRIVING WHILE LICENSE SUSPENDED .....</b>	<b>2</b>
<b>ARTICLE: ARRESTING VIOLATORS WHO REFUSE TO SIGN NOTICE OF INFRACTION ...</b>	<b>6</b>
<b>BRIEF NOTE FROM THE U.S. SUPREME COURT .....</b>	<b>7</b>
<b>FEDERAL COURTS CANNOT RESTORE FEDERAL FIREARMS RIGHTS WHERE CONGRESSIONAL APPROPRIATION BARS BATF FROM DOING SO</b>	
<u>U.S. v. Bean</u> , 123 S.Ct. 584 (2002) .....	7
<b>BRIEF NOTES FROM THE NINTH CIRCUIT OF THE U.S. COURT OF APPEALS.....</b>	<b>8</b>
<b>CALIFORNIA OFFICER'S OBSERVATION OF POSSIBLE "LANE STRADDLING" WAS NOT SUFFICIENT TO JUSTIFY CAR STOP FOR A SUSPECTED DUI UNDER "REASONABLE SUSPICION" STANDARD</b>	
<u>U.S. v. Colin</u> , 314 F.3d 439 (9 <sup>th</sup> Cir. 2002) .....	8
<b>ENTRY OF RESIDENCE TO ARREST ON WARRANT: PAYTON'S "REASON TO BELIEVE" STANDARD FOR DETERMINING PRESENCE OF SUSPECT HELD IDENTICAL TO "PROBABLE CAUSE" STANDARD</b>	
<u>U.S. v. Gorman</u> , 314 F.3d 1105 (9 <sup>th</sup> Cir. 2002) .....	10
<b>CITY EMPLOYER'S COOPERATION WITH FBI'S CRIMINAL SEARCH DOES NOT QUALIFY THE SEARCH AS A NON-INVESTIGATORY EMPLOYER SEARCH</b>	
<u>U.S. v. Jones</u> , 286 F.3d 1146 (9 <sup>th</sup> Cir. 2002) .....	10
<b>BRIEF NOTE FROM THE WASHINGTON STATE SUPREME COURT .....</b>	<b>11</b>
<b>UNDERCOVER DETECTIVE'S RECORDING OF INTERNET ICQ ("I SEEK YOU") COMMUNICATIONS WITH SUSPECTED CHILD MOLESTER HELD ADMISSIBLE UNDER PRIVACY ACT BASED ON IMPLIED CONSENT BY DEFENDANT; ALSO, "IMPOSSIBILITY" DEFENSE REJECTED BECAUSE CRIME CHARGED WAS <u>ATTEMPTED RAPE</u></b>	
<u>State v. Townsend</u> , 147 Wn.2d 666 (2002) .....	11
<b>WASHINGTON STATE COURT OF APPEALS .....</b>	<b>12</b>
<b>DWLS "ARREST" UNDER POULSBO ADMINISTRATIVE BOOKING POLICY HELD "CUSTODIAL" AND "SEARCH INCIDENT TO ARREST" THEREFORE UPHELD</b>	
<u>State v. Craig</u> , ___ Wn. App. ___, 61 P.3d 340 (Div. II, 2002) .....	12

**VEHICLE AND ARREST MUST HAVE CLOSE PHYSICAL CONNECTION AND TIME CONNECTION TO JUSTIFY MV SEARCH INCIDENT TO ARREST: DESPITE FACTUAL FINDING THAT DRIVER-SIDE DOOR OF PICKUP TRUCK WAS OPEN AND THAT ARRESTEE WAS LOCATED ON THAT SIDE OF HIS TRUCK AT TIME THAT ARREST OCCURRED, A FURTHER FINDING SPECIFYING ONLY THAT ARRESTEE WAS “NEAR” HIS TRUCK AT TIME OF ARREST FAILS TO SUPPORT “SEARCH INCIDENT”**

State v. Turner, \_\_\_ Wn. App. \_\_\_, 59 P.3d 711 (Div. II, 2002) ..... 15

**POSSESSION OF FIREARMS AT TIME PERSON COMMITS OR IS ARRESTED FOR FELONY JUSTIFIES FORFEITURE OF FIREARMS UNDER RCW 9.41.098(1)(d)**

State v. Cramm, 114 Wn. App. 170 (Div. I, 2002) ..... 17

**PATTERN OF PRIOR ASSAULTS ON CHILD THAT WAS SIMILAR TO CHARGED ASSAULT IS HELD SUFFICIENT TO SUPPORT CONVICTION FOR SECOND DEGREE ASSAULT OF A CHILD UNDER “PATTERN OR PRACTICE” ELEMENT OF THE CRIME**

State v. Schlichtmann, 114 Wn. App. 162 (Div. I, 2002) ..... 18

**BRIEF NOTE FROM THE WASHINGTON STATE COURT OF APPEALS ..... 20**

**JURY INSTRUCTIONS ON MEANING OF “DISFIGUREMENT” UPHELD IN ASSAULT-TWO CASE**

State v. Atkinson, 113 Wn. App. 661 (Div. III, 2002) ..... 20

**NEXT MONTH ..... 21**

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## **ARTICLE: CUSTODIAL ARREST AND SEARCH INCIDENT TO ARREST OF THOSE ARRESTED FOR DRIVING WHILE LICENSE SUSPENDED**

### **Introduction by LED Editors**

In the December 2002 LED, we promised to revisit and comment on Washington appellate court cases addressing the authority of law enforcement officers: (1) to make custodial arrests of persons driving while license suspended, and (2) to search those violators and their vehicles incident to such arrests.

The current status of the case law in Washington appears to categorically permit custodial arrest and search-incident in these circumstances, except in those cases where, prior to the search, officers communicate to the “arrestee” the officers’ intent not to take the violator in for booking, but instead to merely cite and release the violator at the scene. However, some doubt lingers, as no Washington appellate court has addressed a factual situation where a criminal defense attorney could convince the appellate court to consider whether the custodial arrest was pretextual or close to it. The purpose of this article is primarily to trace the historical development of the case law in Washington and give a status report on an issue that we think is still in its formative stages, not to offer policy arguments for a particular approach or to try to predict the final outcome of the controversy.

### **Historical development of Washington case law on custodial arrests for non-violent misdemeanors and searches incident to such arrests**

In State v. Hehman, 90 Wn.2d 45 (1978), at a point just before the Washington Legislature decriminalized most traffic violations, the Washington Supreme Court ruled as a matter of “public policy” (not necessarily as a matter of constitutional law) that custodial arrest was not generally permitted for minor traffic violations. The Hehman Court did not define what constitutes a “minor traffic violation.” But the Court did hold that driving with an expired license was a “minor traffic violation” for which arrest was not justified absent special or extenuating circumstances that would independently justify custodial arrest.

In 1979, the Washington Legislature decriminalized most traffic violations. At the same time, the Legislature amended RCW 46.64.015 in recognition of the Hehman decision. RCW 46.64.015 thus was amended to require -- with certain categorical exceptions -- that officers hold traffic violators only long enough to cite and release them. Categorically exempt from the cite-and-release requirement in RCW 46.64.015 were the traffic crimes listed in what is now subsection (3) of RCW 10.31.100.

Ten years later, in a short-lived decision, Division One of the Washington Court of Appeals ruled in State v. Stortroen, 53 Wn. App. 654 (1989) that, under the facts of that case, a custodial arrest (and search incident to that arrest) was not permitted for the offense of driving while license revoked. The Stortroen Court so ruled for two reasons: (1) because the officer had admitted in the suppression hearing that his intent at the time of the search had been to merely cite and release the driver if the officer found nothing in the search-incident; and (2) because the Court believed that RCW 10.31.100(3) did not supply the statutory authority for the custodial arrest. The following year, however, the same division of the Court of Appeals overruled the first prong of the Stortroen rationale in State v. Brantigan, 59 Wn. App. 481 (Div. I, 1990). Brantigan involved a custodial arrest for a misdemeanor drug paraphernalia crime. The Brantigan Court ruled that an officer's intent, at the time of the search, to cite and release the violator, is irrelevant to the question of whether an arrest is "custodial." The Brantigan Court concluded that the test is entirely objective, and that the officer's subjective intent is irrelevant. (NOTE: Under Brantigan, it also appears that custodial arrest and search incident to such arrest is permitted for all non-traffic crimes; no case has since suggested otherwise for non-traffic crimes.)

Two years later, the Washington Supreme Court overruled the second prong of Stortroen. In State v. Reding, 119 Wn.2d 685 (1992) **Dec 92 LED:17**, the Supreme Court ruled that one must read RCW 46.64.015 and RCW 10.31.100(3) together. Doing so, the Reding Court concluded that custodial arrest is per se permissible for all of the traffic crimes listed in RCW 10.31.100(3). In Reding, the traffic crime at issue was reckless driving. Because that crime is listed in RCW 10.31.100(3), custodial arrest and search incident to that arrest were per se justified, the Reding Court held.

Thus, reading Reding and Brantigan together, it appears that custodial arrest is per se permitted for any offense listed in RCW 10.31.100(3), regardless of the officer's unexpressed, subjective intent to cite and release the subject of the arrest following a search of the person and car of the arrestee. Under that test, since driving while license suspended or revoked is a crime listed in RCW 10.31.100(3), custodial arrest appears to be per se authorized.

In the 10 years since Reding was decided, criminal defense attorneys have tried with very little success to find a way around the per se nature of that decision, as well as trying to find a way around Brantigan's rejection of subjective considerations in this context. See, for example, State v. Thomas, 89 Wn. App. 774 (Div. III, 1998) **April 98 LED:05**, holding to be irrelevant the fact that, at the time of arrest and search-incident, an officer was under the erroneous belief that a reckless driver fit that local jail standards for booking. The defense bar's single success to date in this regard came in State v. McKenna, 91 Wn. App. 554 (Div. II, 1998) **Oct 98 LED:12**. McKenna did not involve a driving-while-suspended circumstance, but it still is relevant to the question addressed in this article.

In McKenna, Division Two of the Court of Appeals held that a search of a person could not be justified as a search incident to custodial arrest where the person was not actually in a status of custodial arrest at the point when the search occurred. In McKenna, an officer at the scene of a traffic stop communicated to Ms. McKenna that she was not going to be arrested for her outstanding misdemeanor arrest warrants. He instead told her to contact the issuing court and to take care of the warrants. The officer later explained that he had decided at that point not to

make a custodial arrest because the local jail was not then taking most persons arrested for non-violent misdemeanors. The officer issued a citation to Ms. McKenna for the non-arrestable violations of driving while her license was expired and driving without proof of insurance.

After the officer had indicated to Ms. McKenna that she was not under arrest on the warrants, another officer offered her a ride. The second officer asked for consent to search her person and her belongings prior to transport. The second officer then exceeded the scope of Ms. McKenna's consent to that search, discovering illegal drugs in the process. When the prosecutor later tried to justify the unlawful consent search as in fact a "search incident to arrest," Division Two of the Court of Appeals ruled that, while the test of whether a custodial arrest is permissible is an objective one, a person cannot be said to be "under custodial arrest" when the person has been effectively advised otherwise, as happened in McKenna.

Since McKenna was decided in 1998, the Washington appellate courts have rejected criminal defense arguments that the decision somehow undercuts Brantigan's rejection of subjective considerations, or that it undercuts Reding's per se rule of arrest authority under RCW 10.31.100. In State v. O'Neill, 110 Wn. App. 604 (Div. III, 2002) **June 02 LED:02**, it appears that the defendant's attorney attempted to argue to Division Three that the defendant's arrest for driving while suspended should not be deemed custodial because local jail booking policies at the time generally precluded booking for this offense. Relying on Brantigan, the O'Neill Court ruled that RCW 10.31.100(3) per se justified the custodial arrest. The Court declared to be irrelevant the officer's subjective intent or the officer's beliefs about local jail admission policies.

More recently, Division Two of the Court of Appeals issued published opinions in three cases in which it rejected defense attempts to invoke McKenna. First, in State v. Clausen, 113 Wn. App. 657 (Div. II, 2002) **Dec 02 LED:17**, the Court of Appeals rejected a defendant's argument that his arrest for driving while license suspended (third degree) did not justify a search of his vehicle incident to custodial arrest. The local jail had advised local law enforcement prior to Mr. Clausen's arrest that the jail was not accepting non-violent misdemeanor offenders except under special circumstances. The arresting officer testified that he was generally aware of this jail policy, but that he did not verify that the restrictive booking policy at the jail was in effect until he arrived at the jail with Mr. Clausen. The defendant testified that, before the officer searched him and his vehicle, the officer told him that, following the search of the vehicle, the officer was going to book him and release him following the search.

The Clausen Court was quite brief in rejecting defendant's McKenna argument. The Court noted that McKenna "did not hold that the jail's status in any way affected the officer's authority to place the defendant under custodial arrest." Because, unlike in McKenna, the officer in Clausen "clearly manifested his intent to place Clausen under custodial arrest when he told Clausen that he was under arrest and that he would be released after he was booked," the Clausen Court concluded that the arrest was custodial.

The second of the three recent Division Two decisions is State v. Balch, 114 Wn. App. 55 (Div. II, 2002) **Dec 02 LED:19**. In Balch, an officer was told by dispatch that Mr. Balch, who the officer had stopped for speeding, had a misdemeanor warrant from another jurisdiction in Washington. Dispatch initially told the officer that the warrant was "extraditable." The officer also learned that the driver had a suspended license. The officer handcuffed the driver and placed him in his patrol car. The officer then searched Mr. Balch's car, finding a small amount of marijuana (less than 40 grams) in a bag in the passenger area of the car.

After the officer completed the search, dispatch advised the officer that the warrant was not "extraditable." A sergeant at the scene advised the officer to cite and release Mr. Balch, so the officer did that. Following Mr. Balch's release, the officer discovered that the bag also contained cocaine.

At the suppression hearing that followed, the officer testified that he had done the search both because of the “extraditable” warrant and because of the suspended license. Defendant tried to prove that under the agency’s practice the decision whether to make an arrest in the circumstances that were present in his case must be made by a sergeant. Defendant was unable to prove that such a practice existed. The officer testified that the officer’s practice was to book a suspect when the crime was third degree driving while license suspended. The trial court found that under the agency’s practice the officer had the lawful authority to make a custodial arrest, and that the officer had in fact made a custodial arrest before he did the search.

The Court of Appeals, Division Two, distinguished McKenna on grounds that there, before conducting the search, the officers told Ms. McKenna that she was being released, whereas in Balch it was only after the sergeant overrode the officer’s decision, post-search, that the officer cited and released Mr. Balch. The Balch Court also held that that the post-search release of the defendant “did not alter the custodial character of Mr. Balch’s arrest.”

The third of the three recent Division Two decisions on this issue is State v. Craig, \_\_\_ Wn. App. \_\_\_, 61 P.3d 340 (Div. II, 2002) **March 03 LED:12**. In Craig, the Court of Appeals held to be “custodial” for “search incident” purposes a seizure and search under an “administrative booking procedure” of the Poulsbo Police Department. See the description of the Poulsbo PD procedure in the excerpts from the Craig decision set forth below immediately following this article.

The Craig Court rejected the defendant’s argument that, because the Poulsbo officer intended to release him following booking, the arrest was not “custodial.” At the time of the search of Craig’s person (in which illegal drugs were found in a jacket pocket), defendant, who was then in handcuffs, was in custodial arrest status. That fact sufficed to justify the “search incident to arrest” the Craig Court held, regardless of whether the booking procedure would not result in incarceration.

### **Status assessment**

Assume that that jail policy or practice in a particular jurisdiction generally precludes booking such violators absent extenuating circumstances. Assume further that an officer in such a jurisdiction has stopped a car for speeding, that the officer learns that the driver has a suspended license, and that there are no such extenuating circumstances. Cases to date indicate that the officer, regardless of the local jail policy or the officer’s intent in regard to the policy, has discretion to secure the violator and conduct a search of his vehicle incident to arrest.

That said, it must be recognized that in State v. Ladson, 138 Wn.2d 343 (1999) **Sept 99 LED:05** the Washington Supreme Court created a broad “pretext stop” prohibition, thus indicating that the Washington Supreme Court is willing to introduce “subjective” elements into search-and-seizure rules where courts in other states and federal jurisdictions have not. While the Ladson cases did not involve the specific issue that is the focus of this article, and the Washington Supreme Court has refrained in subsequent search-and-seizure decisions from injecting subjective elements into traditional “objective” search-and-seizure tests outside the traffic-stop context of Ladson, the Supreme Court’s approach in Ladson nonetheless suggests that there is some risk in Washington that our Supreme Court will either introduce a subjective test to the law governing “custodial arrest” and “search incident to arrest” or will adjust the objective test in a way that restricts what may appear to the Court to be somewhat arbitrary “fishing” expeditions.

In our view, a clear loser for the State under even the per se objective standard would be where the officer testifies in a suppression hearing both that the officer knew of a local restriction against booking suspended drivers, and that the officer told the defendant before the search that, unless the officer found contraband in the search, the officer intended to merely cite and release the violator following the search. This circumstance would be analogous to McKenna,

we believe, in that the officer would in effect be telling the violator, prior to the occurrence of the search, that the violator is not actually in a custodial arrest situation.

And we think that a bad case scenario for testing the strength of the objective standard under Brantigan, Reding, and McKenna would be where the officer admits in a suppression hearing both (1) that the officer knew of the local jail's flat rule against booking suspended drivers, and (2) that the officer intended, before conducting the search, to merely cite and release the violator unless the officer found contraband in the search. If a defense attorney could prove these facts in a suppression hearing, the Washington Supreme Court might be inclined to declare the custodial arrest to be pretextual, despite the fact that the officer passed the McKenna test by keeping his cite-and-release plan to himself or herself before conducting the search.

### **Postscript re January 30, 2003 Washington Supreme Court decision in O'Neill case**

We do not believe that the analysis in this article must be changed in light of the January 30, 2003 decision of the Washington State Supreme Court in State v. O'Neill. The O'Neill decision, which we will digest in detail in the April 2003 LED, includes a number of holdings, including a holding that a search will not be deemed to be "incident to arrest" unless the "arrestee" has actually been arrested before the search occurs. We will explain in greater detail in the April 2003 LED why we believe that the Washington courts should continue to hold after O'Neill, consistent with the discussion above, that a person who has been handcuffed and placed in the back of a patrol car before his or her car is searched generally should be deemed to be a person who has been actually arrested before the search occurs.

However, the O'Neill decision's emphatic requirement of an "actual" custodial arrest prior to any "incidental" searching, along with our further reflection on the post-McKenna Court of Appeals decisions, does prompt us to suggest the following guidelines for DWLS "search incident": 1) prior to conducting a "search incident to arrest" for DWLS, officers should expressly tell a person that he or she is under arrest for DWLS; 2) officers should not tell the arrestee that they plan to cite and release him or her if they find nothing in the search; 3) officers probably should handcuff and secure the "arrestee" in a patrol car before conducting the search; and 4) if officers find evidence of a more serious crime in the search, officers probably should transport the arrestee for at least administrative booking. Also remember that a search will not be deemed to be "incident to arrest" unless the search is conducted as soon as practicable after the arrest and while the arrestee is still at the scene.

As always, we urge officers and law enforcement agencies to seek advice on these and other matters from their own legal advisors and prosecutors.

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### **ARTICLE: ARRESTING VIOLATORS WHO REFUSE TO SIGN NOTICE OF INFRACTION**

**LED INTRODUCTORY EDITORIAL NOTE:** The following memo was written several years ago by Craig Adams, Legal Advisor in the Pierce County Sheriff's Office. We print it here with Craig's permission. The Tilton ruling referenced in the memo was addressed in the May 1995 LED at pages 20-21 and in the June 1995 LED at pages 7-10. Tilton still poses a problem for officers who would exercise their discretion to arrest a person solely for refusing to sign a notice of infraction. We think that the problem will continue to be posed under the language of the revised citation forms that are to be distributed later this year. Officers and agencies should read this brief synopsis carefully and should check on this issue with their respective prosecutors or other legal advisors.

City of Port Orchard v. Tilton, 77 Wn. App. 178 (Div. II, 1995)

FACTS: A police officer stopped Mr. Tilton for speeding. The officer filled out the Notice of Infraction and demanded that Mr. Tilton sign. He refused to sign. The officer then charged Mr. Tilton with “Failure to Sign Notice of Infraction” and with Obstructing. A jury found him not guilty of Obstructing but convicted him of Failure to Sign. He appealed and the superior court dismissed the charges against him. The dismissal was upheld by the Court of Appeals.

ISSUE: When can a “Failure to Sign” citation be issued?

RULING: RCW 46.61.021(3) provides that any person requested to identify himself to a law enforcement officer pursuant to an investigation of a traffic infraction has a duty to identify himself, give his current address, and sign an acknowledgement of receipt of the notice of infraction. Failure to comply with the provisions of RCW 46.61.021 is a misdemeanor.

However, the Notice of Infraction contains the following language above the signature area: “Without admitting having committed each of the above infractions/offenses, I promise to respond as directed on this notice.”

The Court of Appeals found that the printed language on the Notice of Infraction was not an acknowledgement of receipt of the Notice of Infraction as required by the statute. The promise to respond is different from merely receiving a copy. A motorist stopped for a traffic infraction has no legal duty to promise to appear in court. There is no crime for failing to make that promise!

THE PROBLEM: All Notices of Infraction have the same language. We cannot change that language.

THE CURE: If a person refuses to sign a Notice of Infraction merely ask them to “Copy Receive It”. Write the words COPY RECEIVED on the front of the NOI (away from the general signature block please) and make a line and ask them to sign that they are merely receiving a copy. Have them sign and give them a copy. If they refuse to acknowledge having received a copy, you may arrest—it is up to you. If you are going to arrest, please document all of your steps in your report and include a copy of the NOI with the words COPY RECEIVED clearly indicated on the face of the Notice.

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### **BRIEF NOTE FROM THE UNITED STATES SUPREME COURT**

**FEDERAL COURTS CANNOT RESTORE FEDERAL FIREARMS RIGHTS WHERE CONGRESSIONAL APPROPRIATION BARS BATF FROM DOING SO** – In U.S. v. Bean, 123 S.Ct. 584 (2002), the U.S. Supreme Court rules unanimously that the Federal courts lack authority to restore Federal firearms rights of felons in circumstances where a Congressional appropriation bars the Bureau of Alcohol, Tobacco and Firearm (ATF) from granting such relief.

On its face, 18 U.S.C. section 925(c) of the Federal firearms laws provides authority to ATF to restore the Federal firearms rights of previously convicted persons where such persons can show they are not a danger and that restoration is otherwise in the public interest. However, since 1992, in appropriations bills, Congress has expressly barred ATF from acting on applications filed under 18 U.S.C. section 925(c). In Bean, a Federal District Court in Texas ruled that ATF’s failure to bar (pursuant to the prohibition by Congress) was effectively a denial of restoration, and therefore the merits of the petition could be reviewed by the court. The

District Court granted relief under 18 U.S.C. section 925(c). The Court of Appeals affirmed. Now, the U.S. Supreme Court has unanimously reversed, holding in effect that, until Congress lifts the prohibition on ATF action under section 925(c), Federal firearms rights cannot be restored to convicted persons under that section.

Result: Reversal of lower federal court decisions; Thomas Lamar Bean is denied restoration of this Federal firearms rights.

**LED EDITORIAL NOTE:** RCW 9.41.070(3) of Washington's firearms law incorporates 18 U.S.C. section 925(c) by reference. The Bean decision means that the part of RCW 9.41.070(3) referring to section 925(c) does not provide a viable current restoration-of-rights option until such time, if ever, that Congress lifts the bar against ATF action under Federal law.

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### **BRIEF NOTES FROM THE NINTH CIRCUIT OF THE U.S. COURT OF APPEALS**

**(1) CALIFORNIA OFFICER'S OBSERVATION OF POSSIBLE "LANE STRADDLING" WAS NOT SUFFICIENT TO JUSTIFY CAR STOP FOR A SUSPECTED DUI UNDER "REASONABLE SUSPICION" STANDARD** – In U.S. v. Colin, 314 F.3d 439 (9<sup>th</sup> Cir. 2002), the Ninth Circuit of the U.S. Court of Appeals rules that a traffic stop was not justified by reasonable suspicion of a traffic law violation, and therefore that cocaine and methamphetamine seized in a subsequent consent search must be suppressed.

The Court of Appeals describes as follows the relevant facts and the proceedings in the trial court:

On November 12, 1999, at approximately 2:05 a.m., Sergeant Thomas Carmichael observed a blue Honda traveling at 70 m.p.h. northbound in the right lane on Interstate 15. Carmichael first observed the Honda from his patrol car, which was positioned 75 yards behind it. He observed the car drift onto the solid white fog line on the far side of the right lane and watched the car's wheels travel along the fog line for approximately ten seconds. The Honda then drifted to the left side of the right lane, signaled a lane change, and moved into the left lane. Carmichael next observed the car drift to the left side of the left lane where its left wheels traveled along the solid yellow line for approximately ten seconds. The car then returned to the center of the left lane, signaled a lane change, and moved into the right lane. Carmichael pulled the car over for possible violations of California Vehicle Code § 21658(a) (lane straddling) and California Vehicle Code § 23152(a) (driving under the influence).

Appellant Efrain Estrada-Nava ("Estrada-Nava") was the driver of the car and appellant Eric Colin ("Colin") was his passenger. When Carmichael advised Estrada-Nava of the reasons for stopping him and asked for his license and registration, he noticed that both Estrada-Nava and Colin were nervous and shaking. He also noticed that the glove compartment contained a bottle of air freshener and a radar detector, that there were only three keys on Estrada-Nava's key ring, and that neither Estrada-Nava nor Colin owned the Honda. Suspecting that the car might have been stolen, Carmichael separately questioned Estrada-Nava and Colin about the ownership of the vehicle. On the basis of their slightly conflicting stories, their nervous appearances, and his own training and experience, Carmichael concluded they might be involved in drug trafficking. Estrada-Nava and Colin separately consented to a search of the Honda, which revealed marijuana and methamphetamine.

Colin filed a motion to suppress the narcotics evidence, in which Estrada-Nava joined, arguing that Carmichael illegally stopped the Honda and illegally detained the two of them thereafter. After an evidentiary hearing, the district court denied the motion, concluding that Carmichael had reasonable suspicion to stop the car and that the evidence therefore was legally obtained.

The Colin Court begins its analysis by noting that the standard for justifying a traffic stop is the Terry standard of "reasonable suspicion," it is not the higher standard of probable cause. The Court then proceeds to explain why it believes the seizing officer did not have reasonable suspicion as to either a "lane straddling" violation or a DUI offense under California law. This LED entry will not address the "lane straddling" analysis. On the DUI "reasonable suspicion" issue the Colin Court explains:

Although we recognize that in some cases evidence of weaving might be indicative of driving under the influence, we disagree that the evidence in this case was sufficient for Carmichael to harbor a reasonable suspicion that Estrada-Nava was driving under the influence, thus justifying the stop. Carmichael testified that he observed Estrada-Nava and Colin's vehicle for 35-45 seconds before pulling it over, and that during this time, Estrada-Nava drove within the speed limit and properly activated his turn signals before making lane changes. Carmichael thought Estrada-Nava was "possibly" driving under the influence because the car's wheels touched the fog line on the right side of the right lane for 10 seconds and then, about 5-10 seconds later, touched the yellow line on the far left of the left lane for another 10 seconds.

In People v. Perez, an officer with training and experience in handling cases involving driving under the influence observed a driver weave within his lane (two feet in each direction) for approximately three-quarters of a mile. The court considered as a matter of first impression in California whether an officer "may lawfully detain a driver [on the basis of driving under the influence] who has been observed to be weaving within his lane." 221 Cal.Rptr. 776, 777 (1985) (emphasis added). [*Court's Footnote: The court noted that it has been clearly established in California that "weaving from one lane to another justifies an investigatory stop."*] Adopting the reasoning of cases from other states in which courts have held that weaving within one's lane for substantial distances creates reasonable suspicion of driving under the influence, the court held that "pronounced weaving within a lane provides an officer with reasonable cause to stop a vehicle on suspicion of driving under the influence where such weaving continues for a substantial distance."

Here, Estrada-Nava and Colin did not demonstrate "pronounced weaving" of up to two feet in either direction, or weave for a "substantial distance." In fact, the only "suspicious" behavior Carmichael observed was Estrada-Nava and Colin's car touching the right fog line and the center yellow line each for 10 seconds, after legitimate lane changes. This is hardly "pronounced weaving." See State v. Caron, 534 A.2d 978, 979 (Me.1987) (holding that "single, brief straddling of the center line of the undivided highway, with no oncoming traffic in sight and no vehicles passing on the left ... did not give rise to an objectively reasonable suspicion" of intoxication or fatigue); State v. Bello, 871 P.2d 584, 587 (Utah Ct.App.1994) (finding a single incident of weaving in windy conditions insufficient to justify a stop based on suspicion of drunk driving). Similarly, Carmichael's entire observation lasted only 35-45 seconds, which is not long enough to show that Estrada-Nava and Colin were weaving for a "substantial" distance. We agree with the Tenth Circuit, which has aptly observed:

[I]f failure to follow a perfect vector down the highway or keeping one's eyes on the road were sufficient reasons to suspect a person of driving while impaired, a substantial portion of the public would be subject each day to an invasion of their privacy.

United States v. Lyons, 7 F.3d 973, 976 (10th Cir.1993)

As a final note, we find it curious that Carmichael did not conduct a sobriety field test or ask Estrada-Nava if he had been drinking when he stopped the car. This further convinces us that Carmichael did not harbor reasonable suspicion that Estrada-Nava was driving under the influence. See United States v. Gregory, 79 F.3d 973, 978 (10th Cir.1996) (concluding that where officer did not conduct a road sobriety test after stopping the defendant for briefly crossing into the right emergency shoulder lane, he did not have reasonable suspicion that the defendant was intoxicated); United States v. Ochoa, 4 F.Supp.2d 1007, 1012 (D.Kan.1998) (finding that a single drifting onto the shoulder did not justify stopping defendant on the basis of fatigue and that officer's failure to conduct a sobriety test suggests he did not have reasonable suspicion defendant was intoxicated).

**Result:** Reversal of a California Federal District Court's denial of suppression motions of defendants Eric Colin and Efrain Estrada-Nava.

**(2) ENTRY OF RESIDENCE TO ARREST ON WARRANT: PAYTON'S "REASON TO BELIEVE" STANDARD FOR DETERMINING PRESENCE OF SUSPECT HELD TO BE IDENTICAL TO "PROBABLE CAUSE" STANDARD** – In U.S. v. Gorman, 314 F.3d 1105 (9<sup>th</sup> Cir. 2002), the Ninth Circuit of the U.S. Court of Appeals clarifies its interpretation of the phrase "reason to believe" in the context of the U.S. Supreme Court's search-and-seizure ruling in Payton v. New York, 445 U.S. 573 (1980).

The rule of Payton is that, except when exigent circumstances exist or police are in hot pursuit, officers seeking to execute an arrest warrant may not make a forcible, non-consenting entry of the warrant subject's own residence unless the officers either have "reason to believe" the person is presently inside the residence or the officers have a search warrant authorizing the entry and arrest. In Steagald v. U.S., 451 U.S. 204 (1981), the U.S. Supreme Court held that a search warrant is required for forcible entry of a third party's residence to make an arrest of a non-resident wanted under an arrest warrant.

The Ninth Circuit rules in Gorman, that the Payton rule in the Ninth Circuit of the U.S. Court of Appeals (the State of Washington is located in this circuit) is that "reason to believe" equals "probable cause." The Gorman Court acknowledges both 1) that the U.S. Supreme Court has not clarified Payton's "reason to believe" standard, and 2) that some other circuits have ruled differently.

**Result:** Reversal of Southern California U.S. District Court's suppression decision, which was based on determining "reason to believe" under a "reasonable suspicion" standard; case remanded to District Court to determine whether police had probable cause to believe defendant was inside the premises when officers forcibly entered to arrest him on an arrest warrant.

**(3) CITY EMPLOYER'S COOPERATION WITH FBI'S CRIMINAL SEARCH DOES NOT QUALIFY THE SEARCH AS A NON-INVESTIGATORY EMPLOYER SEARCH** – In U.S. v. Jones, 286 F.3d 1146 (9<sup>th</sup> Cir. 2002), the Court of Appeals rejects the federal prosecutor's argument that a warrantless search of a San Francisco city employee's office was justified as a non-criminal employer search of an employee's workstation.

City of San Francisco Human Rights Commission (HRC) employees were suspected of violating federal law. After learning that some employees might be shredding documents sought by the FBI under a subpoena, the FBI personnel contacted the San Francisco city attorney and the HRC records custodian, among others. Searches of HRC employee offices were conducted by the FBI agents with assistance of city employees. Zula Jones, one of the suspect HRC employees, later moved to suppress evidence found in a search of her office.

The federal government sought to justify the search under O'Connor v. Ortega, 480 U.S. 709 (1987). In O'Connor, the U.S. Supreme Court declared that a worker has a relatively broad reasonable expectation of privacy in his or her workplace office, protecting against warrantless criminal investigatory searches. However, the O'Connor Court held that a warrantless search of a public employee's office by a public employer of work-related reasons, including investigation of employee misconduct, but not as part of a criminal investigatory search, is subject to review under a relaxed standard of generalized reasonableness.

The Jones Court holds that the search of Zula Jones' office was an FBI criminal search, not a City of San Francisco work-related search, and therefore the search was unlawful.

Result: Affirmance of U.S. District Court suppression ruling granting motion of Zula Jones.

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#### **BRIEF NOTE FROM THE WASHINGTON STATE SUPREME COURT**

**UNDERCOVER DETECTIVE'S RECORDING OF INTERNET ICQ ("I SEEK YOU") COMMUNICATIONS WITH SUSPECTED CHILD MOLESTER HELD ADMISSIBLE UNDER PRIVACY ACT BASED ON IMPLIED CONSENT BY DEFENDANT; ALSO, "IMPOSSIBILITY" DEFENSE REJECTED BECAUSE CRIME CHARGED WAS ATTEMPTED RAPE**

State v. Townsend, 147 Wn.2d 666 (2002)

**LED Editors' Introductory Note:** The following summary was prepared by Lana Weinmann, Assistant Attorney General. AAG Weinmann has special expertise in the computer crime area, among other areas. She may be contacted at: 900 Fourth Avenue, Suite 2000, Seattle, WA 98164; (206) 389-2022; [Lanam@atg.wa.gov](mailto:Lanam@atg.wa.gov)

The Washington Supreme Court upheld the decision of the Court of Appeals affirming the Spokane County conviction of Donald T. Townsend for attempted second degree rape of a child. An undercover detective, posing as an underage girl, communicated with Townsend via e-mail and ICQ instant messaging. The detective saved all the e-mails and logged all the ICQ communications using an automatic logging feature of the ICQ software. The communications were admitted into evidence over the defendant's objection. Defendant claimed that the recording of the communications violated the Washington Privacy Act (chapter 9.73 RCW), which prohibits the interception or recording of a private communication.

There was one concurring opinion and one dissent. All of the justices agreed that the communications in question were private communications and were covered by the Privacy Act. All of the justices also agreed that the use of e-mail constitutes implied consent to the recording of that e-mail by the recipient.

The majority held that the defendant also impliedly consented to the recording of the ICQ communications because the ICQ software contained a warning in the terms of service agreement, which notified users that recording or saving ICQ messages was possible and a feature of the software. The dissent felt this was not valid consent. The concurring opinion argued that the recordings were admissible, but not because of the warning or the theory of implied consent. The concurring justices argued that the Court should have concluded that there was no "intercept" because the recording was incidental to the communication and occurred in the same device that participated in the communication.

Troubling questions left unanswered by this decision are the following: What other electronic communications are “private communications”? What other “recordings” of electronic communications constitute violations of the Privacy Act if there is no showing of tacit consent (Intrusion Detection Systems; Firewalls)? What will constitute an effective warning giving rise to implied consent (Banner warnings; Employer Policies)? Can consent be revoked by a savvy suspect stating “consent to log or record is denied” at the beginning of a conversation? Since the Privacy Act provides civil penalties for violations, can a suspect not only be acquitted because the crucial evidence against him is inadmissible, but also sue his victim for recording the communications?

Investigators should be aware of the limitations of Townsend, and they should make sure any instant-messaging software they use includes a warning about logging or recording of the conversations. Links to the opinions are as follows –

Majority opinion is at [<http://www.courts.wa.gov/opinions/opindisp.cfm?docid=710708MAJ>]

Concurring opinion is at [<http://www.courts.wa.gov/opinions/opindisp.cfm?docid=710708CO1>]

Dissenting opinion is at [<http://www.courts.wa.gov/opinions/opindisp.cfm?docid=710708DI1>]

**LED EDITORS’ CLOSING NOTES RE TOWNSEND:** Justice Alexander authored the majority opinion, which was joined by five other justices. Justice Bridge wrote the concurring opinion, in which she was joined by Justice Ireland. Justice Sanders was alone in dissent.

The Supreme Court’s Townsend decision also affirms the Court of Appeals ruling (see the June 01 LED:21) rejecting defendant’s argument that he could not be convicted of attempt where his intended underage “victim,” who he tried to meet at a motel, was in fact an undercover detective of legal age. The Supreme Court explains, quoting from the Court of Appeals opinion:

The Court of Appeals properly rejected argument noting that “RCW 9A.28.020(2) expressly provides that factual impossibility is not a defense to the crime of attempt. The attempt statute focuses on the actor’s intent, rather than the impossibility of convicting the defendant of the completed crime. We agree with the Court of Appeals that “[I]t thus makes no difference that Mr. Townsend could not have completed the crime because ‘Amber’ did not exist. He is guilty .. if he *intended* to have sexual intercourse with her.”

[Citations omitted]

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### **WASHINGTON STATE COURT OF APPEALS**

**DWLS “ARREST” UNDER POULSBO ADMINISTRATIVE BOOKING POLICY HELD “CUSTODIAL” AND “SEARCH INCIDENT TO ARREST” THEREFORE UPHELD**

State v. Craig, \_\_ Wn. App. \_\_, 61 P.3d 340 (Div. II, 2002)

Facts and Proceedings below: (Excerpted from Court of Appeals opinion)

I. Administrative booking procedure

In September 1999, the Poulsbo Police Department instituted an administrative booking policy to help alleviate crowding in the Kitsap County Jail. Under the policy, subjects arrested for criminal driver's license violations are (1) handcuffed and taken into custody, (2) transported to the local police department instead of

the county jail, (3) photographed and/or fingerprinted, (4) given a citation with a court date, and (5) released with no bail having been set. Sometimes the arresting officer detains the arrestee in a holding cell while the officer prepares the camera and fingerprinting equipment.

The Poulsbo Police Department sergeant who instituted the policy testified that administrative booking is necessary to prevent false identifications and arrests. He also stated that a person arrested for driving without a license is put through the same procedure at the police station as at the county jail.

## II. Custodial arrest

On June 13, 2001, a Poulsbo police officer on patrol stopped Craig's vehicle because Craig, the vehicle's registered owner, had a suspended driver's license. After confirming Craig's identity, the officer arrested Craig for driving with a suspended license (DWLS), handcuffed him, and searched him in preparation for transport in a patrol vehicle, to the police department for an administrative booking.

In the course of the search, the officer found methamphetamine in Craig's jacket pocket. The officer arrested Craig for unlawful possession of a controlled substance and transported him instead to the Kitsap County Jail, where he was booked and released.

## III. Procedure

The State charged Craig with unlawful possession of a controlled substance. Craig filed a motion to suppress the methamphetamine found in his pocket during the search. The trial court denied Craig's motion, concluding that the search was incident to a lawful custodial arrest, and convicted Craig on stipulated facts.

ISSUE AND RULING: Was Craig under actual and lawful "custodial arrest" when the officer searched his person pursuant to the Poulsbo P.D. policy on administrative booking of DWLS violators? (ANSWER: Yes)

Result: Affirmance of Kitsap County Superior Court conviction of Adam Nelson Craig for unlawful possession of methamphetamine.

ANALYSIS: (Excerpted from Court of Appeals opinion)

### I. Custodial arrest

Craig contends that the trial court erred by denying his motion to suppress because he was not under custodial arrest when the officer searched his person.

A police officer having probable cause to believe that a person has violated certain traffic laws, here, as RCW 46.20.342, has authority to arrest that person. RCW 10.31.100(3)(e). See also RCW 46.20.349. Searches incident to a lawful custodial arrest are lawful under a recognized exception to the warrant requirement, even under the greater protection provided by article I, section 7 of the Washington Constitution.

Here, the officer had lawful authority to place Craig under arrest for driving with a suspended license. RCW 10.31.100(3)(e). Thus, the search incident to the arrest was lawful if the arrest was "custodial."

Craig argues that his DWLS arrest was non-custodial because the police officer did not intend to keep him in jail; rather, the police merely used the administrative

jail booking procedure as a way to circumvent our holding in State v. McKenna, 91 Wn. App. 554 (Div. II, 1998) **Oct. 98 LED:12**. In McKenna, we distinguished between custodial and non-custodial arrests, holding that an officer may not search incident to a non-custodial arrest. The majority reasoned that the search of McKenna was incident to a "non-custodial arrest" because (1) the officers knew the jail was overcrowded and initially did not intend to take McKenna into custody, despite an outstanding arrest warrant; (2) the officers did not manifest an intention to arrest McKenna and to take her into custody for driving without a valid license; and (3) the officers announced that McKenna was released and free to go before frisking her for weapons as a condition of giving her a ride home in the police car.

In contrast, here, as soon as the officer verified that Craig was the driver, the officer intended and acted to arrest Craig for DWLS, to take him into custody, and to transport him to the Poulsbo Police Department. The officer manifested his intent to arrest Craig by telling him that he was under arrest and placing him in handcuffs. Unlike in McKenna, the officer here never told Craig that he was free to leave before searching him incident to the arrest.

Craig next argues that because his intended detention at the Poulsbo Police Department was not subject to bail, his arrest was non-custodial. But he offers no case law to support this definition of custodial arrest. The State counters that an arrest is custodial when the defendant is handcuffed and placed in a patrol vehicle for transport... We agree.

Recently, we distinguished McKenna in a case factually similar to the one here. State v. Clausen, 113 Wn. App. 657 (2002) **Dec 02 LED:17**. As in McKenna and the case here, overcrowding in the county jail had caused the jail to refuse to book and to hold persons arrested for nonviolent misdemeanors. Nonetheless, we held that unlike the officer in McKenna, here Parker clearly manifested his intent to place Clausen under custodial arrest when he told Clausen that he was under arrest and that he would be released after he was booked.

We also held that "[a]lthough the definition of 'custodial arrest' is not precise," the record showed that Clausen was "under custodial arrest at the time of the search" and, therefore, the search was valid as incident to arrest.

Clausen directly applies here: The officer placed Craig under arrest, handcuffed him, and performed a search before securing him in the patrol car for transport to the jail for booking. Thus, under Clausen, Craig's arrest was custodial, the search incident to his arrest was lawful, and the trial court properly denied Craig's motion to suppress.

## II. Administrative booking policy

Craig next argues that his arrest was non-custodial because the policy underlying the reasonableness of an officer's right to search incident to a lawful arrest did not exist in his situation. Again, we disagree.

Clausen involved a similar, though less formal, booking arrangement as a result of county jail overcrowding. The arresting officer was "generally aware that the jail had not been booking detainees charged with nonviolent misdemeanors," and the officer told Clausen while initially placing him under arrest that "they were

going to impound his vehicle, book him, and then release him." The more formal administrative booking procedure involved here, nonetheless resulted in an analogous sequence of events.

Although Clausen did not directly challenge the legitimacy of the book and release procedure, our holding guides our decision here. As we held in Clausen, that the arresting officer ultimately intends to release a person arrested for a nonviolent misdemeanor after booking does not defeat that person's custodial status at the time of the search incident to arrest. Again distinguishing McKenna,

We did not hold [in McKenna] that the jail's status in any way affected the officer's authority to place the defendant under custodial arrest or that a search prior to the defendant's release was invalid.

Applying Clausen's rationale to the case here, we reject Craig's invitation to extend McKenna by defining "custodial arrest" as an arrest where the defendant cannot obtain release unless he or she posts bail.

[Footnotes and some citations omitted]

**VEHICLE AND ARREST MUST HAVE CLOSE PHYSICAL CONNECTION AND TIME CONNECTION TO JUSTIFY MV SEARCH INCIDENT TO ARREST: DESPITE FACTUAL FINDING THAT DRIVER-SIDE DOOR OF PICKUP TRUCK WAS OPEN AND THAT ARRESTEE WAS LOCATED ON THAT SIDE OF THE TRUCK AT TIME THAT ARREST OCCURRED, A FURTHER FINDING SPECIFYING ONLY THAT ARRESTEE WAS "NEAR" HIS TRUCK AT TIME OF ARREST FAILS TO SUPPORT "SEARCH INCIDENT"**

State v. Turner, \_\_\_ Wn. App. \_\_\_, 59 P.3d 711 (Div. II, 2002)

Facts and Proceedings below: (Excerpted from Court of Appeals opinion)

A deputy sheriff contacted Rickey Turner after he observed Turner urinating in a parking lot. When the deputy first approached, Turner was standing near the open driver's side door of a pick-up truck; another person was seated in the passenger seat.

Turner denied that he had been urinating and became argumentative. The deputy then arrested him for indecent exposure and obstructing a public servant. A second deputy then searched the truck's passenger compartment and discovered a rifle. The State charged Turner with unlawful possession of a firearm and obstructing a law enforcement officer. State v. Turner, 103 Wn. App. 515 (2000) **March 01 LED:11**.

A jury convicted Turner of the unlawful possession of a firearm charge, but we later reversed the conviction and remanded the case for retrial.

On retrial, Turner moved to suppress evidence of the rifle. The trial court granted the motion and dismissed the charge with prejudice.

**ISSUE AND RULING:** Where the trial court findings were that, at the time of his lawful custodial arrest, the arrestee's driver's side pickup truck door was open, he was standing on that side of the truck, and he was "near" the truck, was this sufficient to support the search of the pickup incident to the arrest? (**ANSWER:** No, the word "near" is not precise enough to establish the location of the arrestee at the time of the arrest, and thus the necessary physical connection between the arrestee, his crime, and the vehicle was not established)

Result: Affirmance of Skamania County Superior Court suppression order and dismissal of firearms possession charges against Rickey F. Turner.

ANALYSIS: (Excerpted from Court of Appeals opinion)

Under the search incident to arrest exception to the warrant requirement, officers may search a suspect's person and the area within that person's immediate control at the time of the arrest even in the absence of exigent circumstances. This permission extends to the passenger compartment of the suspect's vehicle if the compartment was within the suspect's immediate control at the time of or "immediately prior" to the suspect's being arrested, handcuffed, and placed in a patrol car. State v. Stroud, 106 Wn.2d 144 (1986). To invoke this exception, the State must prove both close physical and close temporal proximity.

Courts have upheld vehicle searches where, at the time of arrest, the suspect was (1) standing within the [open] door to the passenger compartment; (2) leaning into the vehicle; or (3) within several feet of the vehicle. See Stroud, 106 Wn.2d at 144 (search valid where one suspect was standing in the "swing of the open passenger door" and the other was only a couple of feet away from the vehicle); State v. Bradley, 105 Wn. App. 30 (2001) **June 01 LED:10** (search valid where suspect leaned into vehicle, then walked 10 to 12 feet away from car leaving the door "somewhat ajar").

But the required physical and temporal proximity have been lacking where (1) the suspect has been removed entirely from the scene; (2) the arrest occurred inside a building some distance away from the vehicle; (3) the suspect lawfully parked and locked the vehicle before the police contact; (4) the suspect was away from the car for an unspecified period and at the time of the arrest the officers were between the suspect and the closed car; or (5) the suspect had walked a significant distance away from the vehicle. State v. Johnston, 107 Wn. App. 876 (Div. II, 2001) **Oct 01 LED:18** (car search invalid where arrest occurred after suspects left car, went into store for unspecified time, when they returned the officers were between closed car and suspects, and proximity was unspecified); State v. Wheless, 103 Wn. App. 749 (2000) **March 01 LED:04** (car search invalid where arrest took place inside tavern); State v. Porter, 102 Wn. App. 327 (Div. II, 2000) **Nov 00 LED:05** (car search invalid when suspect was approximately 300 feet from vehicle when arrested); State v. Perea, 85 Wn. App. 339 (Div. II, 1997) **June 97 LED:02** (car search invalid where suspect lawfully exited and locked his car before police contact); State v. Boyce, 52 Wn. App. 274 (1988) (search not valid where suspect had been entirely removed from the scene).

In this case, neither the findings of fact nor the evidence indicate the distance between Turner and the truck; both merely use the relative word, "near." Given that the truck door was open, the driver seat was vacant, and another person was sitting in the passenger seat, it was reasonable for the arresting deputy to assume that Turner was the vehicle's driver. But absent evidence of Turner's proximity to the vehicle, there was no basis for the trial court or this court to conclude that the passenger compartment was within Turner's immediate control when the deputy approached him.

The State argues that the trial court used the wrong legal standard. It contends that the court's reference in its findings to the deputy's failure to observe Turner inside the vehicle and to the absence of evidence that he attempted to reach into or enter it indicates that the court erroneously relied on these facts.

We agree with the State that proof of immediate control does not require evidence that the defendant was in the vehicle or attempting to enter it. But the trial court's descriptive findings do not establish that the court required proof of these facts to establish immediate control.

Here, unlike in Stroud, the record is silent as to the distance between Turner and the vehicle. In the absence of such evidence, the trial court could not find that the vehicle was under Turner's immediate control, a finding necessary to rely on the search of a vehicle incident to arrest exception. Because the State has failed to meet its burden of establishing this fact, the trial court did not err in suppressing evidence of the rifle.

[Some citations omitted]

**LED EDITORIAL COMMENT:** Gosh! This decision seems a bit hypertechnical, but so it sometimes goes with the law and its line-drawing. If the officer had testified that the arrestee was three feet from the open driver's side truck door when the arrest was made (instead of testifying only that the arrestee was "near" the open door), and the trial court had so found as fact, then we are certain that the search would have been upheld under the "bright line" rule for searches incident to arrest involving vehicle occupants. Officers should estimate the distance between arrestee and vehicle in such search incident cases, and prosecutors should ask for the distance in such cases, whether to justify the search under Stroud's "bright line" test or under Chimel's "lunge area" rule.

Our final comment on Turner is that our analysis in the preceding paragraph would differ if the truck door had been closed and the windows rolled up when the officer made the arrest. In that circumstance, and assuming no other facts, it would be difficult for the officer to justify a full passenger-area search under either Stroud's "bright line" test or under Chimel's "lunge area" rule.

#### **POSSESSION OF FIREARMS AT TIME PERSON COMMITS OR IS ARRESTED FOR FELONY JUSTIFIES FORFEITURE OF FIREARMS UNDER RCW 9.41.098(1)(d)**

State v. Cramm, 114 Wn. App. 170 (Div. I, 2002)

Facts and Proceedings below: (Excerpted from Court of Appeals opinion)

While investigating a homicide, police executed a search warrant at Dale Cramm's residence. They discovered marijuana, heroin, and psilocyn (hallucinogenic mushrooms) in Cramm's bedroom, as well as 11 firearms. After Cramm pleaded guilty to possession of marijuana with the intent to deliver and possession of psilocyn, the State moved for forfeiture of the guns pursuant to RCW 9.41.098[d]. At a forfeiture hearing, Cramm asked the court to release to family members five guns having sentimental value and order the sale of the remaining guns. The trial court granted the State's motion for forfeiture and ordered the Snohomish County Sheriff to destroy all the guns.

ISSUE AND RULING: Must a person use or display a firearm in order for the felony-forfeiture provision of RCW 9.41.098(1)(D) to apply? (ANSWER: No)

Result: Affirmance of Snohomish County Superior Court forfeiture order.

ANALYSIS: (Excerpted from Court of Appeals opinion)

According to RCW 9.41.098(1), courts may order forfeiture of a firearm proven to be:

(d) In the possession or under the control of a person at the time the person committed or was arrested for committing a felony or committing a nonfelony crime in which a firearm was used or displayed[.]

Cramm ... contends that RCW 9.41.098(1)(d) only permits forfeiture of firearms used or displayed while committing a crime. In particular, he argues that the phrase "in which a firearm was used or displayed" modifies the word "crime," which is described as either a felony or nonfelony. We disagree.

In interpreting a statute, this court assumes the Legislature means exactly what it says. If the statute is clear on its face, its meaning is derived from the statutory language alone. An unambiguous statute is not subject to judicial construction. A statute is ambiguous if it can be reasonably interpreted in more than one way, but it is not ambiguous simply because different interpretations are conceivable.

Cramm's interpretation of the statute is unreasonable. The language of subd. (1) subsection (d) is unambiguous. The phrase "in which a firearm was used or displayed" refers only to a "nonfelony crime." It is clear that the Legislature intended to distinguish between felonies and nonfelonies by listing them in the disjunctive and adding a further condition for only nonfelony crimes. Subd. (1) subsection (d) clearly authorizes forfeiture of any firearms in the possession or control of a person at the time he or she commits or is arrested for committing any felony. Therefore, the trial court had authority to order forfeiture of the guns found in Cramm's house at the time he possessed the drugs that led to his felony convictions.

[Some citations omitted]

**PATTERN OF PRIOR ASSAULTS ON CHILD THAT WAS SIMILAR TO CHARGED ASSAULT IS HELD SUFFICIENT TO SUPPORT CONVICTION FOR SECOND DEGREE ASSAULT OF A CHILD UNDER "PATTERN OR PRACTICE" ELEMENT OF THE CRIME**

State v. Schlichtmann, 114 Wn. App. 162 (Div. I, 2002)

Proceedings below:

David Schlichtmann was convicted of one count of second degree assault and one count of third degree assault based on his overzealous spanking of his girlfriend's two sons, who were seven and six years old at the time of trial.

Facts: (Excerpted from Court of Appeals opinion)

Jessica and Denene Stevens were friends and former sisters-in-law. During September and October, 2000, Jessica and her boyfriend David Schlichtmann were having financial difficulties. Jessica and Schlichtmann, Jessica's son C.H., and Jessica and Schlichtmann's son D.S. moved in with Denene, her husband Altyn, and their children. Jessica's other children, A.H. and D.H., who had lived with them before, stayed with their grandmother, Colleen Mustoe. C.H. had been diagnosed with "A.D.H.D." and "O.D.D." and was taking medication for these disorders. Jessica, Schlichtmann, and the children remained with the Stevens family for about a month.

The Stevens did not smoke or drink, and Schlichtmann did not drink when he first moved into their apartment. But after about two weeks, he began to drink beer, having several almost every day. At first, both Jessica and Schlichtmann disciplined C.H., but as time went on, Schlichtmann took on more of this task and

spanked C.H. more, rather than using time-outs, talking to C.H., taking away privileges, or having C.H. stand in the corner. Schlichtmann borrowed a belt from Altyn Stevens in order to spank C.H.

On October 12, Jessica, Schlichtmann, C.H. and D.S. were out running errands. C.H. was very hyperactive, fidgety and aggressive. He had to be corrected several times during the day and was told he would get a spanking when he got home. When they returned to the apartment, Schlichtmann spanked C.H. with the belt. Denene Stevens recalled two or three swats and said Jessica was holding C.H.'s legs while Schlichtmann spanked him and C.H. screamed. Jessica recalled one swat and no screaming, and said she did not hold C.H.'s legs. Altyn and Denene Stevens testified that later, C.H. was kicking the walls and making noise, so Schlichtmann gave him another spanking with the belt. Altyn Stevens recalled four swats with the belt accomplished with an overhand swing. Denene Stevens recalled "a couple" of hard swats with a swing, like banging a hammer. Jessica did not mention any other spanking that night.

Denene testified that she discussed the spanking with her husband that night and that they agreed something needed to be done about the situation. The next day, Jessica and Schlichtmann went out to move their belongings into their new apartment. Denene Stevens was babysitting C.H. She called Mustoe and discussed the situation with her. Mustoe had previously been with the children when A.H. began making a snapping noise and C.H. and D.H. began to cry because Schlichtmann snapped the belt when he spanked them. On another occasion when she took the children home, C.H. began to shake when Schlichtmann came out to the car, refused to get out, and ended up going home with her, crying all the way. On Mustoe's advice, Denene called C.H.'s pediatrician, who suggested that she take C.H. to Mary Bridge Hospital.

Denene and Mustoe took C.H. to the hospital. At the hospital, a social worker talked to them, and C.H. told her that Schlichtmann had hit him with a belt. A doctor examined C.H., finding a quarter-sized old bruise on his abdomen and a new bruise 12 centimeters long and three centimeters wide at the top of his right buttocks. She concluded that the bruise on C.H.'s buttocks was not accidental and was consistent with being hit with a belt. C.H. did not need further treatment, as the bruise would heal by itself. There were no other injuries.

The social worker called the police and made a referral to Child Protective Services. The police took statements from Denene and Mustoe, and placed C.H. in protective custody with Mustoe. The next day, police came to the Stevens' apartment and arrested Schlichtmann.

**ISSUE AND RULING:** Was there sufficient evidence of a pattern of past assaults to support a conviction of second degree assault of a child? (**ANSWER:** Yes)

**Result:** Affirmance of King County Superior Court convictions of David M. Schlichtmann for one count second degree assault of a child and one count of third degree assault of a child.

**ANALYSIS:** (Excerpted from Court of Appeals opinion)

Schlichtmann contends that the evidence is insufficient to establish that he engaged in a pattern of assault that caused greater than transient pain or minor temporary marks. We will uphold a verdict of guilt if, "after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt." Second degree assault of a child requires that a person over 18 years of age

[i]ntentionally assaults [a] child [under age 13] and causes bodily harm that is greater than transient physical pain or minor temporary marks, and the person has previously engaged in a pattern or practice . . . of (i) assaulting the child which has resulted in bodily harm that is greater than transient pain or minor temporary marks[.]

In this case, Schlichtmann admits that the evidence adduced at trial proved that he intentionally assaulted C.H. and caused bodily harm that was greater than transient physical pain or minor temporary marks, but asserts that the State failed to prove he had caused the same amount of pain or marks in the past. While there was no direct proof of bruising or other physical injury resulting from past incidents, the testimony of the witnesses established that Schlichtmann had spanked C.H. and D.H. with a belt on prior occasions, that the children were afraid of the belt, that on at least one occasion C.H. began shaking and crying and would not get out of the car when Mustoe returned the children to their apartment but instead went home with her, that these spankings had hurt the boys, and that Schlichtmann had used the same amount of force in the October 12 incident as in prior incidents. These facts are sufficient to support the guilty verdict.

[Citations omitted]

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#### **BRIEF NOTE FROM THE WASHINGTON STATE COURT OF APPEALS**

**JURY INSTRUCTIONS ON MEANING OF “DISFIGUREMENT” UPHOLD IN ASSAULT-TWO CASE** – In State v. Atkinson, 113 Wn. App. 661 (Div. III, 2002), the Court of Appeals rules in an “assault two” case that a jury instruction on the meaning of “disfigurement” was adequate. The defendant was charged with beating his live-in girlfriend. She was scraped and bruised, her eyes were black and blue, and the white of one eye had blood inside (a subconjunctival hemorrhage). The Atkinson Court explains as follows why it holds that the “disfigurement” instruction adequately described the law:

In order to support a conviction for assault in the second degree, the State was required to prove that Mr. Atkinson intentionally assaulted Ms. Paul and thereby recklessly inflicted substantial bodily harm upon her. RCW 9A.36.021(1)(a). “Substantial bodily harm” means bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part.” RCW 9A.04.110(4)(b). **The court instructed the jury that “[d]isfigurement” means that which impairs or injures the beauty, symmetry, or appearance of a person or thing; that which renders unsightly, misshapen, or imperfect, or deforms in some manner.”**

Mr. Atkinson argues that because the court's definition of “disfigurement” is overly broad, the court's instruction regarding substantial bodily harm misstated the law and misled the jury. According to Mr. Atkinson, he could not argue his theory of the case because the court's instructions effectively eliminated the distinction between second degree assault and fourth degree assault.

The definition of “disfigurement” that the court used is the definition given in the former BLACKS LAW DICTIONARY 420 (5th ed. 1979), and the definition acknowledged in State v. Hill, 48 Wn. App. 344, 347, 739 P.2d 707 (1987). The

current BLACKS LAW DICTIONARY 480 (7th ed. 1999), defines "disfigurement" as "[a]n impairment or injury to the appearance of a person or thing." WEBSTERS THIRD NEW INTERNATIONAL DICTIONARY 649 (1993), defines "disfigurement" as "the act of disfiguring or the state of being disfigured." "Disfigure" is defined as "to make less complete, perfect, or beautiful in appearance or character." WEBSTERS, supra, at 649.

The court's definition of "disfigurement" was accurate and merely supplemented and clarified the statutory language. Under the instructions, the State was required to prove that Mr. Atkinson intentionally assaulted Ms. Paul and recklessly caused temporary, but substantial impairment to her appearance or that she was temporarily, but substantially rendered unsightly or deformed in some manner. Under the instructions, Mr. Atkinson was still able to argue his theory of the case, which was that he was only guilty of fourth degree assault by showing the disfigurement was not substantial. The court's jury instructions were sufficient because they are supported by substantial evidence, allowed the parties to argue their theories of the case, and properly informed the jury of the applicable law.

Result: Affirmance of Pend Oreille County Superior Court conviction of William Mitchell Atkinson for second degree assault (exceptional sentence of 10 years also affirmed).

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#### **NEXT MONTH**

The April 2003 **LED** will include entries on: (1) the January 30, 2003 Washington Supreme Court decision in **State v. O'Neill**, where the Supreme Court ruled, among other things, that a search will not be deemed to be "incident to arrest" unless an "actual" and lawful "custodial arrest" occurs before the search is conducted (O'Neill is briefly discussed above in this month's **LED** at page 6); and (2) the January 23, 2003 Washington Supreme Court decision in **City of Sumner v. Walsh**, where the Supreme Court ruled, 5-4, that the City of Sumner's juvenile curfew ordinance is unconstitutionally vague.

Here is a link to the O'Neill majority opinion:

<http://www.courts.wa.gov/opinions/opindisp.cfm?docid=709459MAJ>

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#### **INTERNET ACCESS TO COURT RULES & DECISIONS, TO RCW'S, AND TO WAC RULES**

The Washington Office of the Administrator for the Courts maintains a web site with appellate court information, including recent court opinions by the Court of Appeals and State Supreme Court. The address is [<http://www.courts.wa.gov/>]. Decisions issued in the preceding 90 days may be accessed by entering search terms, and decisions issued in the preceding 14 days may be more simply accessed through a separate link clearly designated. A website at [<http://legalwa.org/>] includes all Washington Court of Appeals opinions, as well as Washington State Supreme Court opinions from 1939 to the present. The site also includes links to the full text of the RCW, WAC, and many Washington city and county municipal codes (the site is accessible directly at the address above or via a link on the Washington Courts' website). Washington Rules of Court (including rules for appellate courts, superior courts, and courts of limited jurisdiction) are accessible via links on the Courts' website or by going directly to [<http://www.courts.wa.gov/rules>].

Many United States Supreme Court opinions can be accessed at [\[http://supct.law.cornell.edu/supct\]](http://supct.law.cornell.edu/supct). This web site contains all U.S. Supreme Court opinions issued since 1990 and many significant opinions of the Court issued before 1990.

Easy access to relatively current Washington state agency administrative rules (including DOL rules in Title 308 WAC, WSP equipment rules at Title 204 WAC and State Toxicologist rules at WAC 448-15), as well as all RCW's current through January 2002, is at [\[http://slc.leg.wa.gov/\]](http://slc.leg.wa.gov/). Information about bills filed in 2002 Washington Legislature is at the same address -- look under "Washington State Legislature," "bill info," "house bill information/senate bill information," and use bill numbers to access information. Access to the "Washington State Register" for the most recent WAC amendments is at [\[http://slc.leg.wa.gov/wsr/register.htm\]](http://slc.leg.wa.gov/wsr/register.htm). In addition, a wide range of state government information can be accessed at [\[http://access.wa.gov\]](http://access.wa.gov). The address for the Criminal Justice Training Commission's home page is [\[http://www.cjtc.state.wa.us\]](http://www.cjtc.state.wa.us), while the address for the Attorney General's Office home page is [\[http://www.wa.ago\]](http://www.wa.ago).

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The Law Enforcement Digest is co-edited by Senior Counsel John Wasberg and Assistant Attorney General Shannon Inglis, both of the Washington Attorney General's Office. Questions and comments regarding the content of the **LED** should be directed to Mr. Wasberg at (206) 464-6039; Fax (206) 587-4290; E Mail [\[johnw1@atg.wa.gov\]](mailto:johnw1@atg.wa.gov). Questions regarding the distribution list or delivery of the **LED** should be directed to [\[ledemail@cjtc.state.wa.us\]](mailto:ledemail@cjtc.state.wa.us). **LED** editorial commentary and analysis of statutes and court decisions express the thinking of the writers and do not necessarily reflect the views of the Office of the Attorney General or the CJTC. The **LED** is published as a research source only. The **LED** does not purport to furnish legal advice. **LED's** from January 1992 forward are available via a link on the Commission's Internet Home Page at: [\[http://www.cjtc.state.wa.us\]](http://www.cjtc.state.wa.us).